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Helping the Bench Find Justice

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Helping the Bench Find Justice

Having the law on your side is sometimes not enough, explains Myron Moskovitz of Golden Gate University School of Law.

Myron Moskovitz

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It's happened to all of us. You wrote a perfect brief: The law was clear and seemed to be on all fours with your facts. A slam dunk, no way the judge could rule against you. And you lost! Then you seethed about the judge: dumb, arrogant, "result-oriented," and worse.

What happened? You could be right about the judge. But maybe something else had occurred. Maybe — probably, in fact — the judge was trying to achieve "justice" and was not going to let a little thing like the law stand in the way. Lord Denning tried to justify this: "If there is any rule of law that impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule — or even to change it — so as to do justice in the instant case before him."

Outrageous? Aren't judges supposed to "follow the law"? Or defensible? Isn't the whole point of having rules to get just results? We can debate that another time. For now, let's deal with the real world. Let's examine how litigators might deal with the fact that judges will indeed, on occasion, ignore the law or twist the facts to get the "right" result.

I learned this the hard way, as a young attorney. And of course, I railed against it, like you did. But as I matured, I realized that railing wasn't doing my clients much good. Maybe it would be better to go with the flow rather than try to swim upstream. If judges want justice, I should give it to them.

Here's the problem. Before you went to law school, you probably had a pretty good intuitive sense of justice. But then law school taught you a more systematic way to "think like a lawyer." Learn and memorize the rule, then apply it to the facts. That's how you write an "A" exam and pass the bar. Don't bother thinking about why the rule was adopted. Your job is to apply "IRAC" (issue, rule, application, conclusion), not to find "justice." If mechanically applying IRAC leads your argument down the garden path to an unjust result, so be it.

This might work on exams, but it often does not work in the real world. Judges do not like unjust results, and they will squirm and turn to avoid them. So where do you find "justice" in your case? Sometimes it's easy — it hits you in the face, as when your client is a little old widow suing a used car dealer who falsely told her "these brakes are in perfect condition." But often it's not that simple. You have to find an angle that will grab the judge's desire to do the right thing, as he or she sees it.

I once represented a city that had enacted one of California's first rent control ordinances. Landlords immediately filed suit, throwing every conceivable legal theory against the wall, hoping one would stick. I won in the trial court and before the California Supreme Court, but the U.S. Supreme Court granted *certiorari* on a single issue: Is rent control a form of price-fixing that is banned by the federal Sherman Antitrust Act? I had some good legal arguments, but the "justice" of the case

posed a real problem. William Rehnquist was chief justice, and most of the other justices were just as conservative as he was. They would not be fans of "socialist" rent control from "The People's Republic of Berkeley" (as the landlords were fond of calling my client). So there wasn't much point in pressing the "justice" of rent control — protecting poor tenants from unconscionable rent increases, etc. That was sure to fall on deaf ears.

Was there any "justice" angle that might appeal to those guys? Well, how about this? Basically, the landlords were arguing that the court should interpret a federal law in a way that knocked out a local law. We would argue that Congress could not have intended to have a federal law interpreted to prevent small communities from resolving local problems in ways that they thought best. "Judge, don't let Big Brother stop little cities — the governments closest to the people — from dealing with local issues as they think best." It worked. *See* *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

Here's another way to look for the "justice" of your case. We sometimes forget the rules do not arbitrarily fall on us from the sky. Someone — judges or legislators — made the rules, for a reason. Usually, that reason is to achieve justice in most cases. If you can show the judge that the reason behind a rule is a just one, and applying the rule in the way you propose will further that just reason in your case, you should win.

Take hearsay as an example. Suppose you represent the plaintiff in a personal injury action against a bus company. You claim that a bus driver ran a red light, plowing into your client in the intersection. The bus company wants to introduce an "accident report" it requires drivers to file — this one being filed a month after the accident, saying that the light was green when he crossed the line. You object, claiming the report is inadmissible hearsay. The bus company invokes the "business records" exception for writings "made at or near the time of the act, condition, or event." Evidence Code §1271.

How might you argue this? "At or near" is so vague that it could mean just about anything. So if you just mechanically focus on those words, you're not going to have much influence on the judge. But think about why the Legislature included the business records exception. Probably because when some worker writes a record when the event is still fresh in a mind not cluttered by a lot of subsequent events, he is more likely to get it right. So reliability is likely the key. But how reliable is a bus driver's memory a month after an event, when 29 days worth of other driving incidents might get things muddled in his mind? That might catch the judge's attention.

And how about adding this? The whole purpose of the hearsay rule is to protect "that great engine of truth-finding": cross-examination. If the judge lets the jury see this less-than-reliable accident report, it will deprive plaintiff of her right to question the writer of that report in person and under oath as to whether he was telling the truth. Isn't the purpose of a trial to help the jury find out the truth? (You can probably come up with your own ideas about how to improve this justice argument. Once you start thinking along these lines, your creative juices will come alive.)

Will this work? Maybe, maybe not. But it surely will have a better chance of persuading the judge than simply urging "30 days is not 'at or near the time,' your honor."

Judges want to do justice. Help them do it, and your chance of winning will be vastly improved.

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